In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 946

BEECH-NUT LIFE SAVERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The instant petition raises two issues concerning the requirement promulgated by the Board in *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966), that employers must furnish to the Board the names and addresses of the employees eligible to vote in a representation election, which information the Board will then make available to all contestants in the election. Petitioner challenges the holding of the court below (1) that the *Excelsior* requirement is valid although promulgated in an adjudicatory proceeding rather

than under the rule-making procedures of the Administrative Procedure Act, and (2) that the Board could compel compliance with the *Excelsior* requirement through a subpoena enforcement proceeding in a federal district court. As petitioner notes (Pet. 5-6), both of these issues are presented in *National Labor Relations Board* v. *Wyman-Gordon Co.*, No. 463, this Term, in which certiorari was granted on November 12, 1968. Indeed, although there is a conflict among the circuits on the validity of the *Excelsior* rule regarding the manner of its adoption, that conflict exists only as a result of the First Circuit's decision in *Wyman-Gordon*, since the five other circuits which have considered the question—the Fourth, Fifth, Seventh and Ninth, and the Second here—have upheld the Board (see cases cited in the Board's brief in No. 463, p. 6).

There can be no dispute that the holding of the court below in the instant case is squarely contrary to that of the First Circuit in *Wyman-Gordon*.[1] Moreover, it seems plain that the issues raised are sufficiently important to warrant review by this Court, as is confirmed by the grant of certiorari in *Wyman-Gordon*. However, the Board believes that these issues will be adequately presented to the Court in *Wyman-Gordon*, and that petitioner points to no special circumstances in this case justifying its separate and additional consideration along with that

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[1] A copy of the Second Circuit's opinion in the instant case is included as Appendix B to the Board's brief in No. 463 (pp. 61-72).

case.[2] The Board has already filed its brief in *Wyman-Gordon*, and the Clerk has advised us that oral argument in that case is scheduled for the session commencing February 24, 1969. Thus, if certiorari is granted here at this late date the effect might well be to delay unnecessarily the resolution of the issues presented.[3] Accordingly, it is suggested that the Court should defer ruling on the instant petition until it decides *Wyman-Gordon*.

Respectfully submitted.

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FEBRUARY 1969.

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[2] Moreover, in its petition for certiorari in *Wyman-Gordon* the Board called attention to the pendency of other similar cases, including the present one, but urged that there was no occasion to await their outcome (Petition in No. 463, p. 10, n.7), and the Court proceeded to grant certiorari.

[3] Petitioner of course is free to seek leave of the parties or this Court to file an *amicus* brief in *Wyman-Gordon*, pursuant to Rule 42(2) and (3) of the revised Rules of this Court.

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